

BEFORE THE
STATE OF CALIFORNIA
OCCUPATIONAL SAFETY AND HEALTH
APPEALS BOARD

In the Matter of the Appeal of:

SOUTHERN CALIFORNIA EDISON CO.
2244 Walnut Grove Avenue
Rosemead, CA 91770

Employer

Docket 12-R3D3-0499

ORDER GRANTING PARTY STATUS
and
DECISION AFTER
RECONSIDERATION

The Occupational Safety and Health Appeals Board (Board), acting pursuant to authority vested in it by the California Labor Code hereby denies the petition for reconsideration filed in the above entitled matter by Faizah Dean (Petitioner).

JURISDICTION

Commencing on August 11, 2011 the Division of Occupational Safety and Health (Division) conducted an inspection of a place of employment in California maintained by Employer.

On January 26, 2012, the Division issued a citation to Employer alleging four general violations of safety orders codified in California Code of Regulations, Title 8.¹

Employer timely appealed, and an evidentiary hearing was set to be held on October 9, 2012, before an Administrative Law Judge (ALJ) of the Board. Prior to hearing, the parties reached a settlement agreement whereby the Division agreed to reclassify two of the four violations from a General to a Notice In Lieu of Citation. The Division also agreed to withdraw the remaining two violations as being duplicative of Citation 1, Item 1. Accordingly, the total proposed penalty was reduced from \$1,500 to zero.

The ALJ found good cause for the parties' agreement and issued an order (Order) approving the settlement on November 8, 2012.

¹ References are to California Code of Regulations, Title 8 unless specified otherwise.

Ms. Faizah Dean (Petitioner) filed a timely petition for reconsideration of the Order.² The Division filed an answer to the petition. Employer did not answer the petition for reconsideration.

ISSUES

Does the Board have jurisdiction to consider Petitioner's petition for reconsideration?

If so, was there good cause for the settlement entered into by the Division and Employer?

REASONS FOR DECISION AFTER RECONSIDERATION

Petitioner was not a party to this administrative proceeding, although she was an employee who complained to the Division about the cited conditions. After the Order issued, Petitioner filed her petition for reconsideration. We construe the petition to also be a motion for party status, which is granted.

We have previously dealt with a petition for reconsideration filed by a person who had not previously been a party to the administrative proceeding. (*California State Dept. of Forestry*, Cal/OSHA App. 85-1378, Order Granting Party Status and Denying Petition for Reconsideration (Aug. 26, 1986).) Here, as there, it is appropriate to grant the petition in order to consider the issues it raises. We now consider the merits of the petition.

Labor Code section 6617 sets forth five grounds upon which a petition for reconsideration may be based:

- (a) That by such order or decision made and filed by the appeals board or hearing officer, the appeals board acted without or in excess of its powers.
- (b) That the order or decision was procured by fraud.
- (c) That the evidence does not justify the findings of fact.
- (d) That the petitioner has discovered new evidence material to him, which he could not, with reasonable diligence, have discovered and produced at the hearing.
- (e) That the findings of fact do not support the order or decision.

Petitioner does not state any of the bases set forth in Labor Code section 6617 above, which is grounds sufficient to deny the petition. (Labor Code sections 6616, 6617 [petition must set forth in detail grounds for petition].) Petitioner's petition can essentially be summarized as follows: (1) she was fired

² Ms. Dean is a former employee of Employer. Although she filed the petition for reconsideration, she did not otherwise participate during the administrative proceedings before the Board.

by Employer after filing a complaint with the Division alleging that Employer did not provide a proper toilet;³ (2) she was generally ignored or not taken seriously by the Division when she filed her complaint; (3) instead of providing a toilet, Employer issued “brief relief bags” or “portable johns” to its employees, which raise privacy and health concerns for women; and (4) the Division has still not resolved her complaint that Employer did not provide a proper toilet facility. (See Petition, pp. 1-2.)

While we consider all of the above allegations to be serious in nature, the Board is limited to evaluating a petition for reconsideration based on Labor Code section 6617. In this regard, Petitioner’s last allegation (claiming that the Division did not resolve her complaint regarding the lack of a proper toilet) can be liberally read to assert that the ALJ acted in excess of her powers by approving the settlement agreement. (Lab. Code § 6617(a).) We therefore examine whether there is good cause for the settlement.

The Division cited Employer for violating four safety orders, all within one citation. Specifically, Item 1 alleged a violation of section 1526(a) [failure to provide minimum of one separate toilet facility for every 20 employees]; Item 2 alleged a violation of section 1526(c) [failure to provide nonwater carriage disposal facilities]; Item 3 alleged a violation of section 1526(d) [failure to provide toilet facility which will ensure privacy]; and Item 4 alleged a violation of section 1527(a)(1) [failure to provide washing facility]. All violations were classified as general with a total proposed penalty of \$1,500. (See summary table.)

On the morning before the hearing, the Division received new evidence that Employer might qualify under the “mobile work crew exception” to section 1526.⁴ (Answer, 4:9-12.) The Division therefore decided to settle the case by downgrading the classifications of Item 1 [failure to provide at least one toilet facility], and Item 4 [lack of proper washing facility] from general violations to Notices in Lieu. The Division also withdrew Items 2 and 3 in their entirety, claiming (in addition to the new evidence concerning a possible mobile work crew exception) that Items 2 and 3 were “duplicative and overlapped with Citation 1, Item 1.” (Answer, 4:9-12.)

Regarding Items 2 and 3, we find that it was within the Division’s discretion to withdraw the violations. The Division was alerted to new evidence that potentially would allow Employer to claim an exception to section 1526, and in light of this new evidence the Division chose to withdraw the violations.

³ While Petitioner’s allegation that she was fired for reporting the violation is taken seriously, it is outside our jurisdiction and properly should be addressed to the California Division of Labor Standards Enforcement (DLSE). It is our understanding that Petitioner was referred to DLSE concerning her retaliation claim.

⁴ Section 1526 does not apply to “mobile crews having readily available transportation to nearby toilet facilities.” (Section 1526(e).)

The Division's authority to evaluate the evidence and decide whether to proceed with litigation is what we have affirmed numerous times as a proper exercise of the Division's prosecutorial discretion. (See *Northern California Paper Recyclers, Inc.*, Cal/OSHA App. 09-2351, Denial of Petition for Reconsideration (Jun. 1, 2010).) Therefore, we find there is good cause for the settlement with regards to Items 2 and 3 being withdrawn by the Division.

We now address the remaining violations contained in Items 1 and 4. As part of the settlement, the Division chose to reclassify both violations from a General to a Notice in Lieu. In support of the downgrade, the Division again argues that it discovered new evidence, and that it was within the Division's authority to settle and issue a Notice in Lieu. (See Answer, 4:4-20.) Simply put, the Division believes that the same reasons that justified withdrawal of the violations in Items 2 and 3 apply when it decides to issue a Notice in Lieu.

The Division misses the point. In order to downgrade a violation to a Notice in Lieu, there are specific statutory requirements that must be met. Labor Code section 6317 provides that a notice may be issued if the violations do not have a "direct relationship" to the health or safety of an employee, or if the violations do not have an "immediate relationship" to the health and safety of an employee, and are general or regulatory in nature. (Lab. Code § 6317.) Additionally, a notice may be issued only if the employer agrees to correct the violations within a reasonable time, as specified by the division.⁵ (Lab. Code § 6317.) These are requirements codified by the Legislature; the Division is not at liberty to ignore or otherwise refer to its prosecutorial discretion in order to meet the requirements contained in Labor Code section 6317.

We have long held that the Division's prosecutorial discretion is not without its limits, and the Board will reject a settlement that is contrary to law or public policy. (*Kinder Morgan Energy Partners*, Cal/OSHA App. 05-2013, Decision After Reconsideration (Oct. 28, 2011); *Northern California Paper Recyclers, Inc.*, *supra*.) Therefore, in order for the Board to find good cause and approve the Notices in Lieu, we must find that the violations under Items 1 and 4 did not bear a direct relationship to the health or safety of an employee; or, that the violations did not bear an immediate relationship to the health or safety of an employee. (Lab. Code § 6317; section 332.1(a).)

While we find that the alleged violations in Item 1 (failure to provide minimum of one toilet facility) and Item 4 (failure to provide washing facilities) do indeed bear a direct relationship to employee safety or health, we also conclude that the violations do not have an immediate relationship to employee safety or health. "Immediate" is defined as "acting or being without the

⁵ The Division's regulations echo the statute by providing that a notice may be issued if either (1) the violation does not bear a direct relationship upon employee safety or health; or (2) the violation bears a direct but not an immediate relationship upon employee safety or health. (§ 332.1(a)(1) and (2).)

intervention of another object, cause, or agency”; or “occurring, acting or accomplished without loss or interval of time.” (Merriam Webster’s Collegiate Dictionary (10th Ed. 1997), p. 578, definitions 1 and 4.) Here, we believe that the lack of a proper toilet facility and lack of a washing facility – as unsanitary, cumbersome, and outright embarrassing as it may be – does not necessarily pose an immediate relationship to the health and safety of an employee. In contrast, examples of violations that would almost always be considered to have an immediate effect on the health or safety of an employee would include the failure to provide fall protection (immediate impact of falling and injury), or failure to properly deenergize/lock-out/tag-out high voltage electrical systems prior to servicing (immediate impact of electrocution). Consequently, a Notice in Lieu would almost never be appropriate for these types of violations.

This is not to say that the failure to provide a proper toilet or washing facility would never qualify as having an immediate relationship to the health and safety of an employee. However, given the record in this particular case, we do not find that an immediate relationship existed.⁶

Finally, we address the remaining requirement that must be met before issuing a Notice in Lieu: an agreement to abate the violation. The Division assures us that Employer will abate and comply with sections 1526(a) and 1527(a)(1). (See Answer, 4:12-20; Lab. Code § 6317.) We also note that Employer must abate within a “*reasonable time* as specified by the Division.” (Lab. Code § 6317; section 332.1(b) [emphasis added].) In this regard, we highlight the unsanitary conditions and general lack of privacy that allegedly are the result of Employer’s failure to provide a suitable toilet. (Petition, pp. 3-4.) We also take seriously Petitioner’s concerns that commercial restrooms are not always freely available, and that businesses can (and often do) require someone to purchase an item before allowing use of their bathroom facilities. (Petition, p. 3.) Given these privacy and health concerns, we would expect that the time period for Employer to abate had already expired. If not, we urge the Division to require Employer to abate as soon as possible.

As stated by the Division, the settlement “continues to bind Employer to comply with [sections 1526(a) and 1527(a)(1)].” (Answer, 4:17-19.) A Notice in Lieu also has the same effect as a citation for purposes of establishing repeat

⁶ Petitioner’s complaints regarding the “disposable johns” and its unsuitability for female use (both in terms of a woman’s privacy and health concerns) are not taken lightly by the Board. However, the Division did not cite Employer for violating a regulation, if one exists, concerning the disposable johns. The violations here specifically involve (1) failing to provide at least one toilet, and (2) failing to provide washing facilities. (Citation 1, Items 1 and 4 [sections 1526 (a) and 1527(a)(1)].) Consequently, when the Division wishes to settle a case and issue a notice in lieu of these violations, we must evaluate whether these particular violations bear a direct or immediate relationship to health and safety of the employee. (Lab. Code § 6317.) Here, we do not find that either violation bears an “immediate relationship” to health or safety. In so finding, we do not mean to diminish or disparage Petitioner’s concerns regarding the inadequacy of the disposable johns, but rather find that there is good cause in the record for the settlement.

violations or a failure to abate. (Lab. Code § 6317.) We trust that the Division will re-inspect as soon as practically feasible in order to ensure that Employer is in compliance with sections 1526(a) and 1527(a)(1).

DECISION

For the above reasons, we find that there was good cause for the Division to reclassify Items 1 and 4 to Notices in Lieu, and to withdraw Items 2 and 3. The ALJ Order approving the settlement agreement is hereby affirmed.

ART R. CARTER, Chairman
ED LOWRY, Member
JUDITH S. FREYMAN, Member

OCCUPATIONAL SAFETY AND HEALTH APPEALS BOARD
FILED ON: APRIL 9, 2013